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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

No. 73-203

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MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

*Petitioner,*

—v.—

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and New York Stock Exchange, an Unincorporated Association. ,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

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**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE  
NEW YORK STATE TRIAL LAWYERS ASSOCIATION,  
*AMICUS CURIAE***

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# INDEX

	PAGE
Motion for Leave to File Brief <i>Amicus Curiae</i> .....	1
Opinion Below .....	3
Constitutional, Statutory and Procedural Rule Involved .....	4
Statement of Case .....	4
Questions Involved .....	7
Summary of Argument .....	7

## ARGUMENT:

I. The constitutional rights of the class members are violated by denying them realistic access to the courts because of the financial inability of the plaintiff .....	9
II. Actual individual notice pursuant to Rule 23 (c)(2) to all class members is neither constitutionally nor statutorily required .....	12
A. Constitutional Requirements .....	12
B. Statutory Requirements .....	17
1. Type of Class Action .....	17
2. Limited Notice Requirement .....	19
3. Type of Notice .....	20
4. Timing of Notice .....	22
5. Cost of Notice .....	23

III. A fluid class recovery is eminently proper as an exercise of the Court's general equitable powers, pursuant to Rule 23, and to foster the remedial intent of the antitrust and securities laws .....	25
CONCLUSION .....	28

## TABLE OF AUTHORITIES

## Cases:

Affiliated Ute Citizens v. U. S., 406 U.S. 128 (1972) .....	26
Almenares v. Wyman, 453 F.2d 1075, <i>cert. den.</i> 405 U.S. 944 (1972) .....	18
Armstrong v. Manzo, 380 U.S. 545 (1965) .....	9
Bebchick v. Public Utilities Comm., 318 F.2d 187 (D.C. Cir., en banc), <i>cert. den.</i> 373 U.S. 913 (1963) .....	26
Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969) .....	23
Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251 (1946) ..	26
Boddie v. State of Connecticut, 401 U.S. 371 (1970) .....	10
Bolling v. Sharpe, 347 U.S. 497 (1953) .....	11
Bowen v. Hackett, Civil Action No. 5038 (D.C. R.I., Order dated May 10, 1973) .....	20
Commissioner of Internal Revenue v. Heinger, 320 U.S. 467 (1943) .....	24
Commissioner of Internal Revenue v. Tellier, 383 U.S. 687 (1966) .....	24
Daar v. Yellow Cab Co., 67 Cal.2d 695, 433 P.2d 732 (1967) .....	26
Deckert v. Independence Shares Corp., 311 U.S. 282, 288 (1940) .....	25
Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968) ....	23

Escott v. Barchris Construction Corp., 340 F.2d 731 (2d Cir. 1965) .....	11
Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970) ....	23
Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95 (1941) .....	20
Francis v. Davidson, 340 F.S. 351 (D. Md. 1972) .....	20
Griffin v. Illinois, 351 U.S. 12 (1956) .....	11
Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1973) .....	20
Hanover Shoe Co. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) .....	25, 26
Hansberry v. Lee, 311 U.S. 32 (1940) .....	13, 14, 15
In re Antibiotic Antitrust Actions, 333 F.S. 278 (S.D. N.Y. 1971), <i>mand. den.</i> , 449 F.2d 119 (2d Cir. 1971) ..	17, 26
J. I. Case & Co. v. Borak, 377 U.S. 426 (1964) .....	25
Katz v. Carte Blanche, 17 FR Serv. 2d 279, — F.2d — (3d Cir. 1973) .....	19
Lamb v. United Security Life Company, 1971-72 Fed. Sec. L. Rep. ¶93,489 (S.D. Iowa 1972) .....	23
Lee v. Habib, 424 F.2d 891 (D.C. Cir. 1970) .....	11
Mack v. General Electric Co., Civil Action No. 69-2653 (E.D. Pa., Sept. 7, 1971) .....	23
Miller v. Alexander Grant & Co., 1971-72 Fed. Sec. L. Rep. ¶93,287 (E.D.N.Y. 1971) .....	23
Mills v. Electric Auto-lite Co., 396 U.S. 375 (1970) .....	25

Mullane v. Central Hanover Trust Company, 339 U.S. 306 (1949) .....	11, 14, 15, 16
Nolop v. Volpe, 333 F.S. 1364 (D.C.S.D. 1971) .....	21
Northern Natural Gas Co. v. Grounds, 292 F.S. 619 (D. Kans. 1968), af'd oth. gds. 441 F.2d 704 (10th Cir. 1971) .....	20
Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465 (W.D. Pa. 1972) .....	23
Perma-Life Muffler, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) .....	26
Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1940) ....	21
Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971) .....	23
Sam Fox Publishing Co. v. U. S., 366 U.S. 683 (1961) ....	13
S.E.C. v. Manor Nursing Center, Inc., 485 F.2d 1082 (2d Cir. 1972) .....	25
Smith v. Swormstedt, 57 U.S. 288 (1853) .....	25
State of Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972) .....	11
State of Minnesota v. U.S. Steel Corp., 44 F.R.D. 559 (D. Minn. 1968) .....	23
Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966) ....	11
Truax v. Corrigan, 257 U.S. 312 (1920) .....	11
University of Southern Calif. v. Cost of Living Council, 472 F.2d 1065 (T.E.C.A. 1972), cert. den., 93 S. Ct. 1364 (1973) .....	25

West Virginia v. Charles Pfizer, 440 F.2d 1079 (2d Cir. 1971), <i>cert. den.</i> 404 U.S. 871 (1971) .....	17, 21, 26
Wyman v. Lopez, 329 F.S. 483 (W.D.N.Y. 1971), <i>aff'd no op.</i> , 404 U.S. 1055 (1972) .....	21
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) .....	25-26

### *Constitutional Provision:*

United States Constitution	
Fifth Amendment .....	4, 7, 9, 11

### *Rules:*

#### Federal Rules of Civil Procedure

Rule 23 .....	<i>passim</i>
Rule 23(a) .....	5, 17
Rule 23(a)(4) .....	16
Rule 23(b) .....	17
Rule 23(b)(1) .....	8, 14, 17, 18, 19
Rule 23(b)(2) .....	8, 14, 17, 18, 19
Rule 23(b)(3) .....	5, 14, 17, 27
Rule 23(c)(1) .....	13
Rule 23(c)(2) .....	7, 8, 10, 12, 13, 15, 19, 20, 21, 22, 23
Rule 23(c)(3) .....	13
Rule 23(c)(4) .....	18, 22
Rule 23(d)(2) .....	15, 16
Rule 23(e) .....	15, 16
Rule 56 .....	18

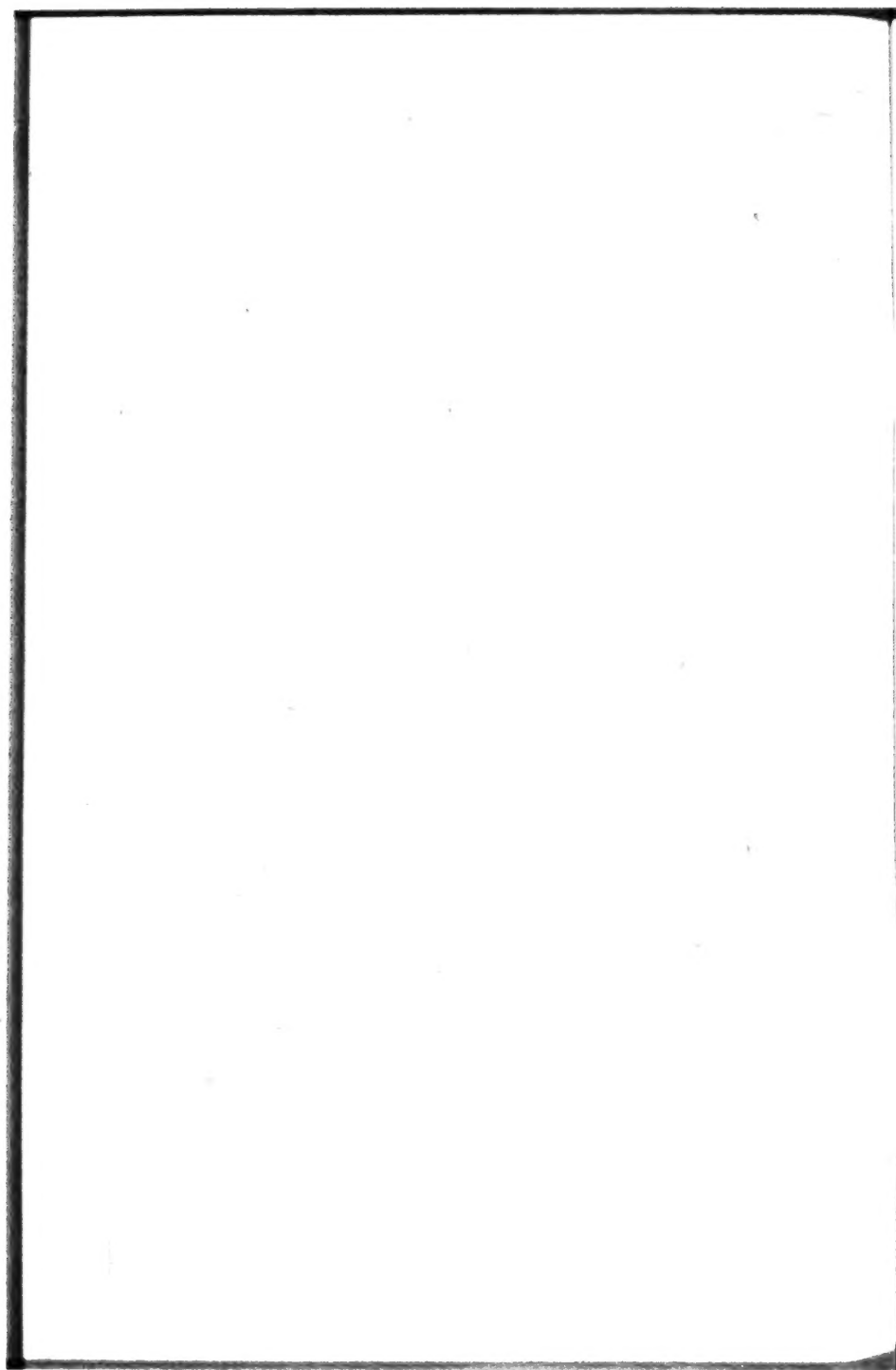
*Statutes:*

15 U.S.C. §§1 and 2 .....	4
15 U.S.C. §§15 and 26 .....	4
15 U.S.C. §§78(f) and 78aa .....	4
26 U.S.C. §162(a) .....	24
28 U.S.C. §§1291 and 1292(b) .....	4
28 U.S.C. §1915 .....	8, 24

*Other Authorities:*

Antineau, Modern Constitutional Law, Secs. 7:13, 7:14; XII Columbia Forum (Summer 1970) .....	9
Advis. Comm. Note, 39 F.R.D. 89 .....	10, 12, 18
Comment, Adequate Representation, Notice and the New Class Action Rule, 116 U. Pa. L. Rev. 889 .....	13
116 Congressional Record, April 28, 1970 .....	28
Homburger, State Class Actions and The Federal Rule, 71 Colum. L. Rev. 609, 637-638 (1971) .....	14
Kaplan, A Prefatory Note, 10 B.C. Ind. & Comm'l L. Rev. 497, 499 (1969) .....	13, 17
Miller, Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3), 54 F.R.D. 501, 512-513 (1972) .....	27
Miller, Problems of Giving Notice in Class Actions, Symposium of Fifth Judicial Circuit, 58 F.R.D. 313, 314-315, 317 (1973) .....	13, 22
1B Moore, Fed. Prac. §1.45 (The Manual for Complex Litigation) .....	23
3B Moore, Fed. Prac. ¶23.55 .....	13

1952 New York State Judicial Conference Report, pp. 240-241 .....	14
1973 New York State Judicial Conference Report, pp. A. 38-39 .....	14
Note, Class Actions, Cost of Notice, 1973 Wisc. L. Rev. 301 .....	23
Note, Proposed Rule 23: Class Actions Reclassified, 51 Virg. L. Rev. 629, 639-640 .....	13, 14
Weinstein, Some Reflections on the "Abusiveness" of Class Actions, 58 F.R.D. 299, 305 (1973) .....	27
7A Wright & Miller, Fed. Prac. & Proc. ¶1775 .....	18
¶1782, p. 103 .....	17
¶1786, p. 148 .....	13



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**MOTION FOR LEAVE TO FILE BRIEF  
*AMICUS CURIAE***

The New York State Trial Lawyers Association respectfully moves for leave to file a brief *amicus curiae* in this case. The petitioner's attorney granted consent to this application by letter, the original of which has been filed with the Clerk. The attorneys for respondents have declined to consent to the filing of this brief.

The New York State Trial Lawyers Association is the largest organization of trial lawyers in New York State. It is the New York affiliate of The Association of Trial Lawyers of America. During its approximately 20-year

existence, this Association has utilized its experience and knowledge to concern itself with various matters affecting the public interest. The right of access to the courts by aggrieved consumers and others seeking to utilize judicial procedures is of particular concern to the Association.

This case involves issues which shall crucially affect the rights of consumers and environmentalists to utilize the federal and state courts to redress wrongs against them. The viability of the class action remedy, or its demise, is the real issue before this court. In view of the broad public interest ramifications transcending the circumstances of this particular case, this Association seeks to present its views.

The Association believes this brief should be of some assistance to the Court in resolving these issues.

Wherefore, it is respectfully requested that the movant's application be granted.

Respectfully submitted,

SHELDON V. BURMAN  
*Attorney for Movant*

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**BRIEF OF THE NEW YORK STATE  
TRIAL LAWYERS ASSOCIATION  
*AMICUS CURIAE***

The interest of *amicus* is set out in the Motion for Leave to File, *supra*.

**Opinion Below**

The opinion of the United States Court of Appeals for the Second Circuit is reported at 479 F.2d 1005.

## **Constitutional, Statutory and Procedural Rule Involved**

The constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution. The rule involved is Rule 23 of the Federal Rules of Civil Procedure. The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, Sections 6 and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§78(f) and 78aa (the "Exchange Act"), and 28 U.S.C. §§1291 and 1292(b).

## **Statement of Case**

This proceeding was commenced in May, 1966 as a class action on behalf of all persons who were compelled to pay an odd-lot (less than 100 shares) differential based on the purchase and sale of common stock listed on the New York Stock Exchange.

Plaintiff's complaint asserts that (i) the two limited partnership stock brokerage firms who are defendants herein, illegally conspired to fix the price of this differential in violation of the federal antitrust laws; (ii) defendant New York Stock Exchange illegally acquiesced in such conspiratorial price-fixing in violation of the Securities Exchange Act of 1934 and its fiduciary obligation to investors.

The complaint requests damages and injunctive relief, including treble damages as to the antitrust claims.

In September, 1966 this action was dismissed as a class action (41 F.R.D. 147). Upon appeal by plaintiff, a motion to dismiss the appeal was denied (377 F.2d 119, *cert. den.*

386 U.S. 1035), in a decision hereinafter referred to as *Eisen I*. The appeal was thereafter decided in March, 1968 (391 F.2d 555), in a decision hereinafter referred to as *Eisen II*.

The *Eisen II* decision reversed the trial court's dismissal of the class action, holding that the action met the requirements of Rule 23(a) F.R.C.P. and was maintainable as a class action under Rule 23(b)(3). The trial court was ordered to conduct further hearings, however, relating to the issues of "notice, adequate representation, effective administration of the action and any other matters which the court may consider pertinent and proper."

On remand, further hearings were held by the trial court on these matters, resulting in decisions by the trial court (50 F.R.D. 471; 52 F.R.D. 253; 54 F.R.D. 565). These decisions held "this suit is a proper class action under F.R. Civ. P. Rule 23 and, except for assessment of the cost of notice yet to be decided, it shall go forward as such." (52 F.R.D. 253, 272) The trial court further decided that to the extent that individual claims for damages were satisfied, a "fluid" recovery could be had, i.e., determination of gross damages to the entire class distributed to present class members (52 F.R.D. 253, 264).

On the "cost" question, the court ordered defendants to pay 90% of the cost<sup>1</sup> of the following notice: individual notice to approximately 2,000 class members who had ten or more transactions; individual notice to 5,000 class members selected at random from the over 2,000,000 identifiable class members; notice by publication in various newspapers. Plaintiff's offer to send individual notice to all

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<sup>1</sup> 54 F.R.D. 565, 573.

New York Stock Exchange brokerage houses and commercial banks with large trust departments, was noted by the court (52 F.R.D. 253, 267-268). A further suggestion was made by plaintiff that notice could be included in customer's monthly confirmation statements from the New York Stock Exchange brokerage firms.

On interlocutory appeal, the trial court's two orders were reversed (479 F.2d 1005), in a decision and judgment hereinafter referred to as *Eisen III*. The court found, inter alia, that individual notice had to be given to all of the 2,250,000 identifiable class members, notice by publication was a "farce", a "fluid class" recovery was improper, a mini-hearing on allocation of costs improper and that plaintiff had to bear the entire cost of notice. One judge on the *Eisen III* panel concurred in the result based only on the defendants bearing 90 per cent of the cost of notice.

A petition for an *en banc* hearing by the Second Circuit was denied (5-3), as the *en banc* panel considered the case "of such extraordinary consequence" that it wanted to "speed" it "on its way to the Supreme Court". (479 F.2d 1020, 1021) A vigorous dissent was delivered by Judge Oakes, concurred in by Judge Timbers. The dissent found the three-man panel opinion, inter alia, to be "very doubtful to say the least", "on its face to give a green light to monopolies . . . unhampered by any realistic thread of private consumer civil proceedings", and "not merely ossifies, but destroys" class actions (479 F.2d 1020, 1022-1023).

### **Questions Involved**

1. Would dismissal of this class action because of the financial inability of plaintiff to pay the cost of notice violate the constitutional right of class members to have their "day in court"?
2. Is individual notice required to be given to the approximately 2,250,000 identifiable class members, with the cost thereof borne solely by plaintiff?
3. Is notice by publication to class members, pursuant to Rule 23(c)(2) F.R.C.P., constitutionally and statutorily proper?
4. Is it within the equitable powers of the district court to adopt procedures and remedies to disgorge past illegal profits and deter future illegal conduct of wrongdoers so as to effectuate Congressional purposes?

### **Summary of Argument**

The decision to be rendered in this case involves no less than the life, or death, of the class action remedy as a means of vindicating the rights of small claimants who are the victims of mass illegalities.

It is urged in point I that realistic access to the courts is a civil right, protectible by the Due Process Clause of the Fifth Amendment to the United States Constitution. Further, that to deprive the class members of the right to be heard on the merits, because of a dismissal of the class action based on the inability of the named plaintiff, who

has a claim of approximately \$70.00, to pay for the enormous cost of notice, is constitutionally defective.

Point II deals with the constitutional and statutory requirements of notice pursuant to Rule 23(c)(2) F.R. Civ. P. On the constitutional level, it is asserted that the crucial factor is adequate representation of the class, not notice of pendency of the action, which is merely for the purpose of permitting class members to opt out.

Moreover, the circumstances in cases of this type render opting out from the class entirely "theoretic rather than practical," because of the small individual claims involved. To require the called for notice would only serve as a destructive force for the class members, not as a source of protection. Only the defendants would benefit. The class members will have no remedy if the concepts of the *Eisen III* decision are followed. The constitutional priorities of the court below would appear awry.

On the statutory level, Rule 23(c)(2) is viewed by *Amicus* as requiring neither of the following: (i) plaintiff to pay for the cost of notice in all cases; (ii) notice in all cases where 23(b)(1) or 23(b)(2)-type actions are involved; (iii) individual notice to all identifiable members of the class regardless of the "circumstances" or whether it is "practicable"; (iv) sending out notice at any particular time. *Eisen III* held to the contrary.

The Court's attention is directed to 28 U.S.C. §1915, which codifies the constitutional principle of access to the courts for all, asserted in point I of this brief.

In summary, to follow the court below, would completely vitiate the intent of Rule 23. As stated by Judge Oakes'

*en banc* dissent, *Eisen III* "seems utterly inconsistent with the flexible, equitable spirit that motivated the innovative 1966 amendments to F.R.C.P. 23."

Point III relates to the propriety of a "fluid class recovery." *Amicus* maintains that it is the duty of the courts, and within their power, to adjust their remedies to grant appropriate relief so as to foster the intent of Congressional enactments. Many decisions of this Court champion effective enforcement of the antitrust and securities laws. Their relevance to this action unmistakably indicates that the "fluid class recovery" management technique employed by the trial court and negated by *Eisen III*, is eminently proper. In any event, such technique would appear to only apply to a small minority of the class.

## ARGUMENT

### I.

**The constitutional rights of the class members are violated by denying them realistic access to the courts because of the financial inability of the plaintiff.**

Access to the courts at a "meaningful time and in a meaningful manner"<sup>2</sup> is a civil right protectible by the Fifth Amendment to the United States Constitution. "One's day in Court" and "the right to be heard on the merits" is "one of the most fundamental requisites of due process."<sup>3</sup> Obviously, an individual member of the class with a \$70.00 claim, as plaintiff herein, challenging monopolistic practices of defendants with enormous financial resources,

<sup>2</sup> *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

<sup>3</sup> Antineau, *Modern Constitutional Law*, Secs. 7:13, 7:14; XII *Columbia Forum* (Summer 1970).

would not have his "day in Court" in a meaningful way, except via the class action remedy.<sup>4</sup>

If the class action procedure may not be availed of by the class members herein, they are rendered remediless. There is no other available method by which the aggrieved class members may redress their grievances which arise from the monopolistic practices alleged. Under such circumstances, the denial of the judicial forum to resolve such claims is a violation of constitutional dimensions. *Boddie v. State of Connecticut*, 401 U.S. 371, 376 (1970).

Even where a statute or a rule, such as Rule 23(c)(2) F.R.C.P., is constitutional on its face, if it is applied in a manner which deprives individuals of their protectible rights and forecloses their opportunity to be heard, such rule cannot withstand constitutional scrutiny (*Boddie*, *supra*, p. 379).

The interpretation placed upon Rule 23(c)(2) by the *Eisen III* court, is clearly a foreclosure of the constitutional rights of the class members to be heard on the merits. Requiring plaintiff to pay the cost of notice and dismissing the class action as a result sounds the "death knell" of the rights of class members (*Eisen I*).<sup>4</sup> Obviously, no court would knowingly add 6,000,000 cases to its trial calendars, nor would defendants welcome such a fusillade of actions.

Moreover, 23(c)(2) notice to the class members merely has the purpose of giving them an opportunity to opt out so that individual members of the class may control their own litigation. Such interest is "theoretic rather than practical" (Advis. Comm. Note, 39 F.R.D. 89, 104), however, in the type of action herein, where the individual claims are too small to warrant individual litigation. The statute of

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<sup>4</sup> *Eisen I*, 370 F.2d 119, 120 (1966).

limitations having elapsed is another reason which makes the opportunity to opt out purely "theoretic."

"Civil rules are written to further, not defeat the ends of justice," *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); cf. *Escott v. Barchris Construction Corp.*, 340 F.2d 731, 733 (2d Cir. 1965). Where a procedural rule is of a type that "stripped of all real remedy" the prevention and redress of wrongs and the enforcement of contracts, it is constitutionally defective. *Truax v. Corrigan*, 257 U.S. 312, 334 (1920). Not only are the "due process" rights of the Fifth Amendment violated in such instances, but "equal protection of the laws," which although not contained in the Fifth Amendment, is embraced by "due process" concepts. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1953).

The decision of the Court below, places fatal restrictions on the prosecution of consumer and environmental class actions, both in federal and state courts, violating the "impossible or impractical obstacle" standards of *Mullane v. Central Hanover Trust Company*, 339 U.S. 306, 313-314 (1949).

Similarly, the spirit and intent of Rule 23 is vitiated. As stated in *State of Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972), Rule 23 provides:

"... for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture" (265-266).

There can be no constitutional propriety in any procedure which makes access to the courts dependent upon "the amount of money a man has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *Lee v. Habib*, 424 F.2d 891 (D.C. Cir. 1970).

The foregoing unassailably shows that the construction of Rule 23(c)(2) by Judge Medina in *Eisen III* is unconstitutional. It strips the named plaintiff and class members of any real remedy because of the financial inability of the named plaintiff.

## II.

**Actual individual notice pursuant to Rule 23(c)(2) to all class members is neither constitutionally nor statutorily required.**

### **A. Constitutional Requirements.**

The opinion below results in the complete deprivation of any relief to which the class members might be entitled. Ostensibly, the rationale of the decision is that the constitutional rights of the class members are infringed because of less than "perfect" notice. Thus, the "perfect" notice called for becomes the instrument for the most imperfect of remedies, i.e., no remedy. The true purpose of notice, viz., "for the protection of the members of the class and otherwise for the fair conduct of the action" is completely overlooked (Advis. Comm. Note, 39 F.R.D. 69, 107).

To bury the remedy by individual notice inundation is not only unnecessary, but fatal, to the real protection of the class. Such notice is of benefit only to the wrongdoers. The dismissal of the class actions would permit them to retain their ill-begotten gains.

An absurd example of the effect of *Eisen III* is given by Judge Oakes in his *en banc* dissenting opinion. Since the

plaintiff "can never advance the money for notice to, say, all the people in the city phone book, who certainly are identifiable," pollution cases would always be dismissed. Finally, Judge Oakes finds *Eisen III* to be "utterly inconsistent with the flexible, equitable spirit that motivated the innovative 1966 amendments to F.R.C.P. 23" (479 F.2d 1020, 1023).

It is the adequacy of representation which is the constitutional foundation for permitting class actions to bind absent members of the class, not notice. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *Sam Fox Publishing Co. v. U. S.*, 366 U.S. 683, 691-692 (1961); 3B Moore's, Fed. Prac. ¶23.55; 7A Wright & Miller, Fed. Prac. & Proc. ¶1786, p. 148; Note, Proposed Rule 23: Class Actions Reclassified, 51 Virg. L. Rev. 629, 639-640; Miller, Problems of Giving Notice in Class Actions, Symposium of Fifth Judicial Circuit, 58 F.R.D. 313, 314-315 (1973); Kaplan, A Prefatory Note, 10 B.C. Ind. & Comm'l L. Rev. 497, 499 (1969); Comment, Adequate Representation, Notice & the New Class Action Rule, 116 U. Pa. L. Rev. 889.

Indeed, under original Rule 23(c)<sup>5</sup> in force from 1938 to 1966, notice was required only as to a "true" class action and only upon dismissal or compromise of the action. No notice at all was required in a "hybrid" or "spurious" class

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<sup>5</sup> Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

action (51 Vir. L. Rev. 629, 639, *supra*; 1952 N.Y.S. Judicial Conference Report, pp. 240-241). The present counterparts of the "true", "hybrid" and "spurious" categories are Rule 23(b)(1), 23(b)(2) and 23(b)(3), respectively.

A proposed New York State class action statute is contained in the 1973 Judicial Conference Report of the State of New York. Proposed Section 904 thereof permits notice to be dispensed with entirely, in the following instance:

"... where notice would be burdensome and costly, the interests of the individual members of the class in controlling the litigation minimal, an effective representation of the class obtainable without notification" (pp. A. 38-39).

It is obvious that the drafters of that section do not deem notice to be a constitutional requirement in class actions. A functional point of view is taken, dependent on circumstances. See: Homburger, 71 Colum. L. Rev. 609, 637-638 (1971).

Even where the class is relatively small, such as the 113 trust funds and beneficiaries thereof, in *Mullane, supra*, notice by publication "in case of persons missing or unknown" (p. 317) was expressly held to be constitutionally proper. Moreover, the question of the "finality" (p. 313) of a decree was there involved. In *Hansberry, supra*, the court was also concerned with finality.

Here, however, it must be kept in mind that this action is still at a preliminary stage. The class members are not bound until judgment is entered. The "finality" of binding

decrees, which was the concern of the *Mullane* and *Hansberry* decisions, *supra*, is not present. Notice pursuant to Rule 23(d)(2) and 23(e) remain to be given.

*A fortiori*, the notice requirements for this type of case, if any, are based on standards which are much less stringent. For example, in *Hansberry*, the court held that considerations relative to proceeding as a class action "differ from those which must be taken into account in determining whether the absent parties are bound by the decree" (p. 42), within "due process" concepts.

The average class member was found by the trial court to have had approximately five transactions of the asserted illegal nature during the four-year period from May, 1962 through June, 1966. The average odd-lot differential was found to be \$5.18 per transaction, amounting to a total differential of \$25.90 (52 F.R.D. 253, 257). The *Eisen III* decision assumed a 5 per cent illegal overcharge on this average total differential, or \$1.30 per class member actual damages and \$3.90 for trebled damages (479 F.2d 1005, 1010).

Common sense would dictate that 6,248,000 claimants with such small recovery possibilities have absolutely no reason for opting out. Their right to opt out would be wholly "theoretic". This is particularly so herein where the Statute of Limitations would bar new actions.

With the opting out benefit of no practical use to the small claimant, or even to the 2,000 class members having ten or more transactions who would be given individual notice, the only benefit of 23(c)(2) notice would be solely to the defendants. Firstly, defendant would be able to obtain a judgment which would be *res judicata* against all

class members who did not opt out. Secondly, even if res judicata benefits were not derived by defendant, the *stare decisis* authority of any opinion would be most compelling. Thirdly, one-way intervention would be avoided by defendants, i.e., class members could not, as under the old Rule 23, wait until a favorable determination on the merits was made and then intervene. In view of all these benefits accruing solely to the defendants, it is not constitutionally proper to burden the plaintiff with the cost of notice.

In summary, with respect to the 4,000,000 "unknown" members of the class, publication notice is the best notice "practicable" within the *Mullane* doctrine. With respect to the approximately 2,250,000 class members who can be identified with reasonable effort, and the "unknown" members, the following additional notice would be had: (i) individual notice to 5,000 class members selected at random from the identifiable members of that class; (ii) individual notice to all New York Stock Exchange firms; (iii) individual notice to all commercial banks with large trust departments, who would have fiduciary obligations to the beneficiaries of these trusts; (iv) the wide newspaper and other media coverage of this case; (v) individual notice given to approximately 2,000 members having ten or more transactions; and (vi) any notice to be later given under Rule 23(d)(2) and 23(e). The foregoing notice program ensures that all differing opinions, if any, among the class members, will have an opportunity to be asserted.

The trial court has found the 23(a)(4) requirement of "adequate representation" to have been met. This finding has not been disturbed by the Second Circuit opinion below. Since adequate representation is the crucial element to satisfaction of constitutional standards, not notice of pendency

of an action, the notice ordered by the trial court is constitutionally proper.

## **B. Statutory Requirements.**

### **1. Type of Class Action.**

The revision of Rule 23 in 1966 had two primary purposes, to wit, (i) avoiding a multiplicity of suits; and (ii) providing a "means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all" (10 B.C. Ind. & Comm'l L.J. 497, *supra*). This latter purpose has been approvingly and unanimously noted in cases arising from the Second Circuit Court of Appeals,\* including *Eisen I* and *II*.

Rule 23(a) sets forth four conditions precedent to the maintenance of a class action. These four requirements have all been found to have been met herein and are not challenged by defendants or the *Eisen III* opinion.

Rule 23(b) sets forth three separate categories of actions which may be maintained as class actions upon satisfaction of Rule 23(a) criteria. This action has been found to fall within Rule 23(b)(3), although an analysis of 23(b)(1) and (b)(2) reveals, on its face, that this action may be maintained under either 23(b)(1)(B) or 23(b)(2). Certainly, a determination of the propriety of the challenged monopolistic practices "would as a practical matter be dispositive of the interests of the other members not parties to the adjudication," either on *res judicata* or *stare decisis* princi-

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\* *In re Antibiotic Antitrust Actions*, 333 F.S. 278, 282-283, 289 (S.D.N.Y., 1971), *mand. den.*, 449 F.2d 119 (2d Cir. 1971); *West Virginia v. Charles Pfizer*, 440 F.2d 1079, 1090 (2d Cir. 1971), *cert. den.* 404 U.S. 871 (1971); see also: 7A Wright & Miller, *Fed. Proc. & Prac.* §1782, p. 103.

ples. At the very least, a decision on the merits would "substantially impair or impede their [class members] ability to protect their interests." Under such circumstances, class action relief is appropriate under 23(b)(1)(B).

The substantive antitrust and securities issues herein are either legal or illegal. Each of the members of the class would be identically affected by these issues. The measure of damages with respect to members of the class would likewise be identical. The only individual issues involved would be the exact amount of damages sustained by each of the class members. Differences of this type, however, would in no way affect the substantive liability questions. Indeed, summary judgment pursuant to F.R.C.P. Rule 56 may be granted, notwithstanding open questions as to the damages sustained.

Even if, *arguendo*, Rule 23(b)(1)(B) were not appropriate, this action would properly be maintainable under 23(b)(2) for declaratory and injunctive relief, together with incidental monetary damages and restitution. *Advis. Comm. Note 39 F.R.D. 69, 102; Almenares v. Wyman*, 453 F.2d 1075, 1086 (note 15a), *cert. den.* 405 U.S. 944 (1972); 7A Wright & Miller, *supra*, §1775.

Further flexibility in resolving the common substantive issues is provided for in 23(c)(4), in the following manner.

"(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

In a recent case *Katz v. Carte Blanche*, — F.2d —, (3d Cir. 1973), 17 F.R. Serv. 2d 279, the liability and damage issue were separated in the above manner. The controlling common liability issue was first to be determined with the damage question to be resolved thereafter. As stated by the court:

"Clearly, the controlling question of law as to defendant's liability in this case is readily amenable to disposition by class suit. The question of defendant's liability under the Act (Truth-in-Lending) involves a single determination of law. Thus, the task facing a court in making the threshold determination is essentially the same whether one plaintiff be involved or whether a class of 800,000 be involved. The additional managerial tasks forced upon a court are more than offset by the judicial economy realized in disposing of the controlling legal issue in one consolidation proceeding" (p. 282).

Judge Oakes in the *en banc* opinion in this case (479 F.2d 1020, 1023), suggested such an approach, among others, to prevent the unnecessary "burial" of this action while viable alternatives existed.

## **2. Limited Notice Requirement.**

Rule 23(c)(2) requires notice to be given to class members *only* in class actions "maintained under subdivision (b)(3)." If this action is maintainable under Rule 23(b)(1) or (b)(2), as set forth above, notice at the pleading stage in the proceeding is not required under the statute. The court below (*Eisen II*), however, *in dictum*, stated that notice is constitutionally required in all class actions. For all of the reasons more particularly set forth in point I, *supra*, this

view is in error. Additionally, various courts have expressly rejected this view and dispensed with 23(c)(2) notice entirely. *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1973); *Northern Natural Gas Co. v. Grounds*, 292 F.S. 619, 636 (D. Kans. 1968), *af'd oth. gds.* 441 F.2d 704 (10th Cir. 1971); *Francis v. Davidson*, 340 F.S. 351, 361 (D. Md. 1972); *Bowen v. Hackett*, Civil Action No. 5038 (D.C. R.I., Order dated May 10, 1973).

### 3. Type of Notice.

Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

The court below interprets the latter phrase of the rule, starting with the word "including," as mandating that perfect notice be given, i.e., actual individual notice to each and every one of approximately 2,250,000 identifiable class members. Under this view, such notice is required regardless of the "circumstances" and without consideration of whether such notice is "practicable" or not, or the purpose of such notice.

There is nothing in the legislative history of Rule 23 to require such a niggardly, delimiting construction of the word "including". The whole format of Rule 23 is one geared to flexibility and judicial inventiveness. The word "including", within the intendment of Rule 23, and as an essential remedial procedure for the enforcement of the antitrust and securities laws, and other consumer-oriented legislation, should not be considered as a word of limitation, but "simply as an illustrative application of the general principle." Cf., *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941).

Similarly, this Court in *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1940), so interpreted an unfair labor practice provision of the National Labor Relations Act. This provision called for "affirmative action, including reinstatement of employees." It was held that such language did not mean that only former employees were within its coverage. The Court (Frankfurter, J.) rejected defendant's limiting interpretation of the word "including", in the following language:

"To attribute such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application. . . . The word 'including' does not lend itself to such destructive significance" (p. 189).

The word "including" in 23(c)(2) is merely illustrative of one type of notice which may be given, dependent upon the "circumstances." The cases supportive of this view include:

*Wyman v. Lopez*, 329 F.S. 483, 486 (W.D.N.Y. 1971), *af'd no op.*, 404 U.S. 1055 (1972):

(Notice to class members via posting of signs in local social service departments, although names and addresses of all class members known.)

"Drug" Cases, *supra*, *West Virginia v. Pfizer*, 440 F.2d 1079, 1090:

(Notice by publication to consumers of drugs, although large segments of the class were identifiable.)

*Nolop v. Volpe*, 333 F.S. 1364 (D.C.S.D. 1971):

(Notice by publication in college newspaper and TV and radio station, although names and addresses of all students known.)

In any event, even if such notice were required, the individual notice to approximately 7,000 members of the class would meet such stringent requirements. Hence, an appropriate subclass under Rule 23(c)(4) would be created.

Dismissal of the class action would consequently not be warranted as to these 7,000 class members, nor the approximately 4,000,000 unidentifiable class members who would receive notice through publication, media coverage, New York Stock Exchange firms or from the trust departments of large commercial banks, or those who would receive notice through their monthly brokerage firm statements.

#### 4. Timing of Notice.

Rule 23(c)(2) does not state when the required notice should be sent out. In the within action, for example, this notice has still not been sent out, although the action was commenced in 1966. The class members would not be prejudiced, however, since they could exclude themselves from whatever date was set forth in the notice eventually sent (See: Miller, *supra*, 58 F.R.D. 313, 317). However, as a practical matter, since the Statute of Limitations would foreclose any new actions, the likelihood of opting out by class members, the purpose of 23(c)(2) notice, would undoubtedly be the product of either ignorance or mistake.

The failure of any class members to intervene, or opt out, during this seven-year period, despite this case being well known to the financial community and to the public through extensive media coverage, is reflective of the theoretic nature of 23(c)(2) notice. When the notice issue at bar is viewed in this light, the perfect notice called for by the court below appears wholly unrealistic and only conducive to gross violations of consumers' rights.

### 5. Cost of Notice.

Rule 23(c)(2) does not state who shall bear the cost of notice. 1B Moore, Fed. Prac., §1.45 (Manual for Complex Litigation), states on this issue as follows:

"Rule 23 is silent on the cost of preparing and distributing the required (c)(2) notice. This is an appropriate area for the exercise of the court's discretion, 'having in mind the objective of enabling the class action device to be used effectively to prosecute a meritorious claim (instead of being foreclosed as too expensive). . . ."

In the within action, as discussed above, the benefits of notice accrue only to defendants. Further, the probability of success of plaintiff in this action has been found by the trial court, after extensive hearings, to be so compelling that 90% of the cost of notice was allocated to the defendants (54 F.R.D. 565). The trial court has properly exercised its discretion.

The apportioning of the cost of notice is not unusual. There is substantial authority for such allocation. *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968); *Rothman v. Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971); *State of Minnesota v. U.S. Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968); *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969); *Feder v. Harrington*, 52 F.R.D. 178, 184 (S.D.N.Y. 1970); *Miller v. Alexander Grant & Co.*, 1971-72 Fed. Sec. L. Rep. ¶93,287 (E.D.N.Y. 1971); *Mack v. General Electric Co.*, Civil Action No. 69-2653 (E.D. Pa., Order of September 7, 1971); *Lamb v. United Security Life Company*, 1971-1972 Fed. Sec. L. Rep. ¶93,489 (S.D. Iowa 1972); *Ostapowicz v. Johnson Bronze Co.*, 54 F.R.D. 465, 466 (W.D. Pa. 1972); Note, Class Actions, Cost of Notice, 1973 Wisc. L. Rev. 301.

Another factor warranting that the cost of notice be borne by defendants, is that such costs are "ordinary and necessary" expenses deductible by defendants for income tax purposes, pursuant to 26 U.S.C. 162(a). See: *Commissioner of Internal Revenue v. Tellier*, 383 U.S. 687 (1966); *Commissioner of Internal Revenue v. Heinger*, 320 U.S. 467 (1943).

One other factor militates against plaintiff being asked to bear the cost of notice. It is provided by statute (28 U.S.C. §1915), as follows:

"(a) Any court of the United States may authorize the commencement, prosecution, or defense of any suit action or proceeding, civil or criminal, or appeal thereon, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such cost or give security therefor . . .".

It is clear that the plaintiff is "unable to pay" the cost of notice required by the court below to proceed with the prosecution of this action. The constitutional infirmities of depriving class members of access to the courts because of mere financial inability, urged in point I, *supra*, has been codified by the aforesaid statute.

## III.

A fluid class recovery is eminently proper as an exercise of the Court's general equitable powers, pursuant to Rule 23, and to foster the remedial intent of the anti-trust and securities laws.

The Federal Courts have the power to "adjust their remedies so as to grant the necessary relief where federally secured rights are invaded", and indeed it is "the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose". *J. I. Case & Co. v. Borak*, 377 U.S. 426, 433 (1964); *Mills v. Electric Auto-lite Co.*, 396 U.S. 375, 391 (1970); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940); *S.E.C. v. Manor Nursing Center, Inc.*, 485 F.2d 1082, 1104 (2d Cir. 1972); *University of Southern Calif. v. Cost of Living Council*, 472 F.2d 1065 (T.E.C.A. 1972), *cert. den.*, 93 S. Ct. 1364 (1973).

If this action cannot proceed as a class action, it is a "green light" for monopolists, consumer defrauders and polluters. Consumers would have no remedy against mass illegalities, in the state or federal courts. Disrespect for the rule of law would thereby be engendered and illegality encouraged. The common law equitable power of a court to deal with class actions, even before Rule 23, to prevent a "failure of justice," was enunciated by this court 120 years ago. *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853).

This Court in a long line of cases, has championed the effective enforcement of antitrust and securities laws. E.g., *Hanover Shoe Co. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Zenith Radio Corp. v. Hazeltine Research*,

*Inc.*, 395 U.S. 100 (1969); *Perma-Life Muffler, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138-139 (1968); *Affiliated Ute Citizens v. U. S.*, 406 U.S. 128 (1972).

In *Hanover Shoe Co.*, *supra*, this court went beyond the "fluid class recovery." It allowed recovery from the anti-trust wrongdoer even where no damage at all may have been sustained, as the additional monopolistic costs may have been passed on to the ultimate consumer (p. 494). The rationale: To do otherwise would have allowed the wrongdoer to violate the law with impunity.

The difficulty of ascertaining damages in antitrust cases has not deterred this Court from fostering the strong public policy underlying the antitrust laws. As stated in *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251 (1946):

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" (p. 264).

The Second Circuit, in other opinions contrary to the panel below, has expressly permitted "fluid class recovery". In *Re Antibiotic Antitrust Actions* and *West Virginia v. Pfizer*, *supra*. There is ample other authority for this procedure.<sup>7</sup>

As stated by Judge Lord (333 F.S. 278, 282) in the *Antibiotic Antitrust Actions*, *supra*, defendants "wrongfully conclude that no remedy is better than an imperfect one." Otherwise, wrongdoers would "freely engage in predatory price practices . . ." (p. 282). See also: Miller, Problems

<sup>7</sup> *Bebchick v. Public Utilities Comm.*, 318 F.2d 187 (D.C. Cir., en banc), cert. den. 373 U.S. 913 (1963); *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 433 P.2d 732 (1967); *Miller, infra*, 54 F.R.D. 501, 512-513.

in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3), 54 F.R.D. 501, 512-513 (1972); Weinstein, Some Reflections on the "Abusiveness" of Class Actions," 58 F.R.D. 299, 305 (1973).

Rule 23 provides no guidance on the "management" problem, i.e., the ascertaining and distributing of damages. It merely sets forth that this element be one of the considerations taken into account by the trial court (Rule 23(b)(3)(D) in a 23(b)(3)-type class action. The Advisory Committee Note, *supra*, likewise provides no enlightenment on this issue. Most assuredly, there is nothing in Rule 23 itself which bars the use of a "fluid-class recovery" technique to handle management problems.

On the other hand, there is ample support for a flexible, inventive and liberal construction of Rule 23, a strong public policy to effectively enforce the antitrust and securities laws and permitting courts to adopt remedies which would foster the intent of federal legislation. As a deterrent to future illegal conduct and to prevent illegality from being profitable, the wrongdoers must be disgorged of their tainted profits. Plaintiff is acting as a private attorney general for this purpose.

In the within action, 56% of the challenged transactions have been found to be on computer tapes, which can precisely identify the individual transactions (52 F.R.D. 253, 257). Of the remaining 44% of the class, fluid class recovery would only be necessary to the extent that individual claims were not subsequently satisfied. Thus, the fluid-class recovery technique would only apply to a minority of the class members. As between the bilked and the bilker, judicial remedies to prevent injustice are entirely within the power of the trial court and to be encouraged, not criticized.

## CONCLUSION

It has been estimated by U. S. Senator Philip Hart, Chairman of the U. S. Senate Subcommittee on Antitrust & Monopoly Legislation, that consumers, through "fraud and deception in the marketplace" are illegally bilked of "\$174 to \$231 billion each year."\*

The magnitude of this consumer bilking displays the urgent need for effective class action enforcement of the antitrust and other consumer laws. Constitutional requirements of "due process" mandate access to the courts on a realistic basis. To deprive the consumer of a judicial remedy, which the dismissal of this class action would surely do, would be tantamount to legalizing illegality. Both state and federal court proceedings would be so affected.

For the reasons stated above, the decision and judgment of the United States Court of Appeals for the Second Circuit (*Eisen III*), should be reversed.

Respectfully submitted,

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Dated: November 29, 1973

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\* 116 Congress Rec., April 28, 1970.